

APPEAL NO. 042333  
FILED OCTOBER 19, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 30, 2004. The hearing officer determined that the respondent's (claimant) average weekly wage (AWW) is \$892.50. The appellant (carrier) appeals the determination on sufficiency grounds. The claimant urges affirmance of the hearing officer's decision.

DECISION

Affirmed.

The claimant sustained a compensable injury on \_\_\_\_\_. At the time of the injury, he had been a full-time employee with the same employer since January 1, 2001. He testified that he worked as an inspector of fiber optic cable and was on call 24 hours per day, 7 days a week. He received two checks from his employer every two weeks. The claimant testified that one check was salary. Testimony showed that he was paid at a rate of \$85.00 per day, 7 days a week, whether he worked or not. The claimant testified that the second check constituted a per diem allowance for the use of his truck and cell phone, \$35.00 for the truck and \$7.50 for the phone. The hearing officer stated in the Background Information section of the decision and order that the employer paid these sums 7 days a week regardless of whether the claimant actually performed any work for the employer. Therefore, she determined that the claimant earned a total of \$127.50 per day or \$892.50 per week. While there was no testimony to dispute the claimant's assertions, the carrier noted that payroll records for September and October 2001 (post injury) indicate that the claimant did not receive the same amount during each pay period for truck and phone expenses. The carrier argues that this is evidence that the payments constituted reimbursement for use of the claimant's equipment. There were no payroll records in evidence for the pay periods prior to August 16, 2001.

The dispute on appeal is whether the truck and phone portion of the checks represents a per diem allowance or reimbursement.

Tex. W.C. Comm'n, 28 TEX ADMIN. CODE § 128.1(b) (Rule 128.1(b)) states:

Except as provided by § 128.7, an employee's wage, for the purpose of calculating the AWW, shall include:

(1) all pecuniary wages....

Rule 126.1(3) states:

Pecuniary wages--Wages paid to an employee in the form of money. Examples of pecuniary wages include, but are not limited to:

\* \* \* \*

(D) Any monetary allowance such as for health insurance premiums, vehicle/fuel, food/meals.

Rule 128.1(c) states:

An employee's wage, for the purpose of calculating the AWW, shall not include:

(1) payments made by an employer to reimburse the employee for the use of the employee's equipment....

Texas Workers' Compensation Commission Appeal No. 931152, decided February 4, 1994 concerned a flat, \$50.00 per diem payment to cover lodging and meals when the employee worked out of town. While no Texas cases were found on this subject, the panel cited from Larson, Workmen's Compensation Law, Vol. 2 § 60.12, and cases from other jurisdictions, concluding,

A recurring theme, with little exception in Larson's treatise and the case notations . . . and the language of the 1989 Act and TWCC Rules is that some advantage or financial or economical gain attaches to the claimant from the particular item in question to bring it within the ambit of wages. That is, if it merely reimburses him for an expense he sustains and does not provide any financial or economic gain for his performance of personal services for the employer, it is not a form of remuneration.

Based on this analysis, the panel in Appeal No. 931152, *supra*, reversed and rendered, holding that the per diem payments were not wages and noting the employee's testimony that these payments frequently did not cover his actual expenses of meals and lodging.

In Texas Workers' Compensation Commission Appeal No. 972569, decided January 27, 1998, the Appeals Panel affirmed a hearing officer's determination that the lodging and \$10.00 per day meal payments the employer made to the claimant 7 days a week, regardless of whether or not he was working, were properly included in the AWW. In Appeal No. 972569, *supra*, we stated "[w]e believe the regularity of the payments, the fact that they were paid based upon a seven-day week, not just working days...are sufficient evidence to support the hearing officer's decision that such amounts are remuneration and as such includable in claimant's AWW."

In the case before us, the hearing officer heard testimony that the claimant received \$35.00 each day for the use of his truck and \$7.50 each day for the use of his

phone, based upon a 7-day week, whether he worked or not. There was no evidence submitted which indicated that these payments were related to actual expenses. Therefore, the hearing officer could logically find that the claimant was receiving a financial or economic gain from these payments and not simply being reimbursed for an expense and that determination is supported by the evidence.

With regard to the carrier's contention in the instant case, which challenges the factual sufficiency of the evidence to support the hearing officer's findings and her conclusion that the claimant's AWW is \$892.50, we conclude that the hearing officer's findings and conclusion are supported by sufficient evidence and that they are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **FAIRFIELD INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM  
350 NORTH ST PAUL STREET  
DALLAS, TEXAS 75201.**

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Veronica L. Ruberto  
Appeals Judge

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Edward Vilano  
Appeals Judge